Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

THOMAS EINHORN and WILLIAM D. WRIGHT,

Petitioners,

v.

WILLIAM LaCHANCE and HERMANN HOSPITAL,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas, Sitting In Houston, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment require proof of actual malice in a slander suit against non-media defendants?

2. Did the Texas Court of Appeals misinterpret First Amendment law to conclude that the Petitioners, helicopter pilots in a hospital life flight program, were "limited purposed public figures," required to prove actual malice in their slander suit against their former employer, because the Petitioners had voluntarily injected themselves into a public controversy over the safety of the hospital's life flight program.

3. Did the Texas Court of Appeals misinterpret First Amendment law to set aside a jury's finding that the Respondents acted with actual malice when they slandered the Petitioners, on the theory that the First Amendment (i) requires the factfinder to accept the Respondent's professions of good faith, even if they disbelieve the testimony, and (ii) disallows proof of actual malice through circumstantial evidence.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners, Thomas Einhorn and William D. Wright, petition this Court for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals for the First District of Texas, at Houston, Texas. Petitioners seek review of (1) the opinion and judgment, dated January 16, 1992 in cause no. 01-90-00769-CV, styled *Einhorn v. LaChance*, and reported at 823 S.W.2d 405, 414 (Tex. App. – Houston [1st Dist.] 1992, writ dism'd w.o.j.), and (2) the opinion and judgment dated March 30, 1995, in cause no. 01-94-00180-CV, styled *William LaChance and Hermann Hospital v. Thomas Einhorn and William D. Wright*, which opinion is not reported.

JURISDICTION

The final judgment sought to be reviewed on appeal after remand, was entered on March 30, 1995. The Texas Court of Appeals overruled Petitioners' motion for rehearing on April 27, 1995. On November 16, 1995, the Supreme Court of Texas dismissed for want of jurisdiction the Petitioners' application for writ of error to the Court of Appeals. At the time this case was in litigation, the Texas Supreme Court had no appellate jurisdiction over slander cases, unless the decision of the Court of Appeals was determined to be in conflict with a decision of another Texas intermediate appellate court. TEX. GOV'T CODE § 22.001. The Texas Supreme Court declined to exercise appellate jurisdiction over either of the Court of Appeals' decisions in the instant case.

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257, providing for review by writ of certiorari where any right, title, privilege, or immunity is specifically set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under, the United States.

CONSTITUTIONAL PROVISION INVOLVED

The issues presented arise under the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,

as applied to the States by the Fourteenth Amendment to the United States Constitution, section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioners will be referred to collectively as "Plaintiffs," or by their surnames, and the Respondents as "LaChance" and "Hermann Hospital," or collectively as "Defendants."

Plaintiffs were pilots who worked for Hermann Hospital's Life Flight program from 1982 through 1986. Defendant LaChance was their superior. Plaintiffs sued after they were fired and then falsely accused of incompetence and corruption, contending that LaChance hated them and wanted to ruin their careers because of their concerns and activities regarding safety problems in Hermann Hospital's Life Flight helicopter operations. The Defendants maintained that they fired Einhorn and Wright because of a "conflict of interest," helping steer business to a competitor.

This petition addresses two state court appeals with two records. The first, a summary judgment proceeding, raised and addressed the question whether the Plaintiffs were "limited purpose" or "vortex" public figures. The case was remanded for trial on that basis. The jury found that the Plaintiffs satisfied their burden to show the Defendants slandered the Plaintiffs with actual malice and awarded damages. The second appeal addressed the sufficiency of the Plaintiffs' circumstantial evidence of actual malice. The Texas Court of Appeals found that the Plaintiffs failed in their proof and reversed the judgment entered on the jury's verdict.

The record in the first appeal consists of a "transcript," the papers filed in the district court summary judgment proceedings. That record is referred to by page

number, such as "1 Tr. 178." The record in the second appeal includes a "transcript" and a "statement of facts," the multi-volume transcription of the court reporter's notes from the trial. That record is referred to also by page number, as "2 Tr. 17," and "7 S.F. 104-105." References are made to the Opinions of the Texas Court of Appeals in the Appendix by appendix page number, as "App.-14."

A. Background Facts

The Plaintiffs' occupation is hazardous and enormously stressful. Life flight pilots habitually fly in dangerously low altitudes and poor weather conditions. (7 S.F. 104-105.) The hours they work and the duties they perform produce conditions of chronic fatigue. (7 S.F. 26.) Raw statistics show that one out of every two helicopter pilots has a major crash, and one out of every four has an accident which results in death. (6 S.F. 132.)

In February of 1985, all of Hermann Hospital's Life Flight pilots addressed a letter to the hospital administration describing their concerns. (3 S.F. 97-98.) The letter to the hospital president was actually written by Plaintiff Einhorn, but the other pilots contributed to it and they all signed it. (3 S.F. 108.) They described "a major compromise of safety" arising from their work schedule and/or the number of pilots employed in the life flight program. They requested a meeting with the hospital's management to discuss, "substantiate" and resolve their safety concerns. *Id.*

The letter to the hospital was a serious miscalculation. The effect on the hospital was "like somebody

dropping an atomic bomb" (3 S.F. 99); or, at least, "an awful lot of commotion." (4 S.F. 108.) LaChance, Hermann Hospital's Director of Aviation Management, "hit the ceiling." LaChance was visibly angry with the Plaintiffs, whom he blamed for the letter. (6 S.F. 103, 112.)

LaChance told Einhorn that the pilots were "in a lot of trouble." (3 S.F. 101.) As LaChance metaphorically described the pilots' precarious position to Einhorn, they were riding in a sports car on a collision course with a Mack truck. (3 S.F. 107.) LaChance pointedly mentioned that the large Houston law firm of Fulbright & Jaworski was driving the truck. (3 S.F. 107.) LaChance threatened the pilots as a group not only with losing their jobs, but with never getting another job if anything happened as a result of their letter. (3 S.F. 107.) LaChance made a point to communicate those threats to Einhorn and Wright individually. (3 S.F. 107, 7 S.F. 35.)

Word soon spread among the pilots that LaChance was trying to get rid of them. (3 S.F. 100-01, 7 S.F. 35.) The "chief pilot" in the program, something of a first mate serving as liaison between LaChance and the "line pilots," made a point to tell all of the pilots as a group and Plaintiff Wright individually that LaChance had "hit the ceiling," and was making arrangements to replace all of them. (3 S.F. 99, 101, 7 S.F. 32.)

Hermann Hospital had formerly considered Einhorn and Wright to be quite competent pilots. However, the Plaintiffs started receiving significantly lower job performance ratings after the letter was written. (1 Tr. 178, 184.)

In May of 1985, Wright was transferred to the Galveston operation of the Life Flight program. (7 S.F. 33.)

One week later, Wright was told that the transfer was permanent. (7 S.F. 33.) The chief pilot told Wright that LaChance would permit Wright's return to Houston if Wright humbled himself before LaChance and convinced LaChance that Wright was sorry for his role in the letter. (7 S.F. 33.)

On January 21, 1986, Einhorn and Wright were both fired. (3 S.F. 129.) LaChance obtained the authorization of the hospital's chief operating officer, Ronald Stutes, to fire the Plaintiffs by telling him that the Plaintiffs were actively soliciting Hermann Hospital's customers in Galveston, and asking Hermann Hospital's customers not to use Hermann's Life Flight program. (6 S.F. 34-35, 42-45.) Stutes' decision to fire the Plaintiffs was based on those misrepresentations. (6 S.F. 23, 24-25, 7 S.F. 94-95.)[1]

LaChance told Wright that he was being terminated immediately because of the discovery of his involvement in a "conflict of interest," a business activity in direct competition with Hermann Hospital. (7 S.F. 94-95.) The thought of such an activity had never crossed Wright's mind. (7 S.F. 88.) However, LaChance offered Wright no opportunity to refute or deny the accusation. (7 S.F. 94-95.)

In the presence of the other pilots and hospital staff members, the chief pilot took Einhorn's identification badge and escorted him from the hospital premises. (3 S.F. 129.) Einhorn was not apprised of the reason for his

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[1] The Defendants did not challenge or appeal the jury's findings that LaChance's assertion that the Plaintiffs were engaged in this conflict of interest constituted "a substantial variance between the facts themselves and the facts as reported." (2 Tr. 448, App.-14.)

firing until the fact was disclosed to him in the course of Texas Employment Commission hearings several weeks later. (3 S.F. 141, 5 S.F. 67.)

LaChance did not end his vendetta by simply firing Einhorn and Wright. LaChance admitted that he contacted a contractor with the Hermann Hospital Life Flight program in order to discredit the Plaintiffs. He testimonially claimed that he merely expressed his disappointment that the contractor would contemplate lending support to the professional pilots' organization which the Plaintiffs were using "as a vehicle to attack the hospital." (5 S.F. 61.) However, other evidence showed that, in January and February of 1987, LaChance made a number of phone calls to assert that the Plaintiffs were trying to unionize the pilots. (7 S.F. 185.)

LaChance also seized upon the opportunity to vilify the Plaintiffs when he attended a meeting which had been arranged to discuss the purchase of a helicopter. (7 S.F. 191.) In a room full of people, LaChance launched a loud and vicious personal attack on the Plaintiffs. (7 S.F. 191, 193.) He called them troublemakers who were inciting unrest among the other Hermann Hospital pilots. (7 S.F. 192.) Using foul language for emphasis, LaChance called the Plaintiffs liars and incompetent pilots. (7 S.F. 191, 192, 201.) LaChance staged the same tirade at meetings of national organizations which he attended. (7 S.F. 147.)

The act of actionable defamation for which LaChance and Hermann Hospital were brought to trial constituted part and parcel of LaChance's hate campaign. Shortly after the firings, LaChance made the defamatory remark

to Dr. Stothert of the University of Texas Medical Branch ("UTMB").[2] LaChance told Stothert the Plaintiffs had been fired for a "conflict of interest," setting up a flight program in direct competition with Hermann Hospital. (5 S.F. 72.) LaChance arranged a meeting with Stothert and perhaps other UTMB representatives for the following day so that he could describe the alleged "conflict of interest" in person and in more detail. (5 S.F. 105-106.) LaChance also arranged a meeting with the late Mike Beaumont of Bayport Aviation in order to induce Beaumont to sign a written statement purporting to corroborate LaChance's allegations. (5 S.F. 68-69, 107.) Beaumont refused. (5 S.F. 70.)

LaChance chose to slander the Plaintiffs at a time when the phrase "conflict of interest" conjured the image of Hermann Hospital officials under prosecution for theft and official misconduct, and during the pendency of the Plaintiffs' unfair labor practices proceeding which would turn on their testimonial credibility before the National Labor Relations Board. (5 S.F. 83-85, 5 S.F. 77.) LaChance made his spectral accusation of "conflict of interest" even though:

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[2] In the first appeal, the Texas court held that LaChance's statements that Plaintiffs were "incompetent," and "liars" and "troublemakers" were not defamatory, or were privileged as a matter of Texas law. The statement to Dr. Stothert is the one aspect of LaChance's conduct which the Court of Appeals held to be actionable, reversing the summary judgment for the Defendants as to that one statement.

(a) Hermann Hospital had no policy applicable to these employees which either defined or prohibited any "conflict of interest" (5 S.F. 77);

(b) Despite having a practice of educating employees as to what was expected of them, no hospital official ever suggested to Plaintiffs that there was any such thing as a "conflict of interest" (7 S.F. 56);

(c) The Plaintiffs were encouraged to do anything UTMB requested of them (7 S.F. 56-57); and

(d) LaChance was not only aware that other employees of the Hermann Hospital Life Flight program were engaged in "conflict of interest" type activities, but approved such activities. (8 S.F. 59-61.)

In fact, the Plaintiffs were not engaged in any competing business (1 Tr. 179, 186) and did not participate in any negotiations between the UTMB and Bayport Aviation. (1 Tr. 102-103, 174-175, 190-191.) Mike Beaumont, President of Bayport Aviation, Inc., explained that to LaChance. (1 Tr. 174-175.) These rumors and remarks by Hermann Hospital hurt the Plaintiffs' reputations and made it nearly impossible for them to obtain other employment. (1 Tr. 180, 186-187, 194-195.)

B. Procedural History

On September 4, 1986, Plaintiffs brought suit in the United States District Court for the Southern District of Texas alleging violations of federal and state statutes, and defamation. (1 Tr. 46, 105.) A summary judgment for the Defendants on all claims was reversed by the United States Court of Appeals for the Fifth Circuit as to pendant

state law defamation claims. (1 Tr. 46, 47.) The action in federal court was then dismissed without prejudice. (1 Tr. 47, 81.) Plaintiffs then filed suit in state court to reassert their state law defamation claims. (2 Tr. 17-29.)

The Defendants again moved for summary judgment in the state court, asserting (among other things) that Plaintiffs qualified as limited purpose public figures, and that there was no evidence of actual malice on the part of the Defendants. The state district court granted the Defendants' motion for summary judgment as to all the Plaintiffs' claims. The Texas Court of Appeals agreed that the Plaintiffs were public figures because they had "thrust themselves into the vortex of a public issue involving aeromedical safety and engaged the public's attention in an attempt to influence its outcome." (App.-28.) The case was remanded for trial of Plaintiffs' defamation claims, subject to their proof of actual malice by clear and convincing evidence. *Id.*

On remand, the jury found that LaChance's statement amounted to a substantial variance from the truth, and that it was "defamatory," meaning that the statement exposed the Plaintiffs to public hatred, or ridicule and/or that the statement tended to impeach the Plaintiffs' honesty, integrity, virtue, or reputation. (2 Tr. 447-448.) The jury also decided that LaChance had acted with "actual malice" by making the statement with knowledge that it was false or with reckless disregard for whether it was false or not. (2 Tr. 447-448.) The trial court entered judgment accordingly. However, the Court of Appeals reversed that judgment and rendered judgment for the Defendants, concluding that Plaintiffs failed to offer any

legally cognizable evidence to satisfy their constitutionally required burden of proof of actual malice. (App.-14-15.) The Texas Supreme Court declined to review either decision of the Texas Court of Appeals, for want of appellate jurisdiction over slander cases. (App.-56, 37.)

REASONS FOR GRANTING THE WRIT

A. Public Figure Question

More than 16 years has passed since this Court last focused on the "limited purpose" or "vortex" public figure principles first developed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). In *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979) and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 456 (1979), as well as in *Gertz v. Robert Welch, Inc., supra*, this Court balanced the competing interests of First Amendment policy and the State's interest in preventing and redressing injuries to individuals' reputations in favor of the respective defamation plaintiffs before the Court in each of those cases. However, a great number of decisions from the state courts and federal courts of appeals have conducted this balancing test to yield a contrary result on substantially analogous facts. *See generally*, Annot: Who is "Public Figure" For Purposes of Defamation Action, 19 A.L.R.5th 1 (1994), cataloguing the opinions of "literally hundreds of state and federal courts" which have addressed this question since *Gertz v. Robert Welch, Inc., supra*. Some of those decisions, such as the appended

opinion of the Texas Court of Appeals, yield this result in an almost cursory fashion.

Many of the decisions composing this now massive jurisprudence called for the balancing of the state defamation law and First Amendment policies in the context of non-media persons who defame others, outside of the context of assuring "the vigorous debate on public issues that the First Amendment was designed to protect." *Hutchinson v. Proxmire, supra,* 443 U.S. at 133-34, 99 S. Ct., at 2687. The decision of the Texas Court of Appeals here is just such a case. This Court declined to decide whether and how the "public figure" standard can apply to an individual, non-media defendant in *Hutchinson v. Proxmire, supra,* fn. 16, and has declined to address the questions since that time. *See Philadelphia Newspapers, Inc. v. Hopps,* 475 U.S. 767, 779 fn. 4, 106 S. Ct. 1558, 1565 fn. 4, 89 L. Ed. 2d 783 (1986). The discerning lower courts still express doubt as to whether the Constitution applies the same standards to media and private defendants. *Underwager v. Salter,* 22 F.2d 730, 734 (7th Cir. 1994). This petition squarely presents that question in the context of the defamation of helicopter pilots by their former employer, not in the pursuit of vigorous discussion of the public controversy, but to satisfy some personal vendetta.

The Texas Court of Appeals decided that Plaintiffs were limited purpose public figures because:

> (1) In 1984, prior to appellants' filing suit, appellants, "recognizing that the Hermann Hospital Life Flight program provided not only insufficient compensation to the pilots for the

job done, *but also created a very dangerous situation for those pilots and the persons flying with them, as well as others in the community,* organized NEMSPA, an international organization to further their concern for aeromedical safety." . . .

(2) Wright has served as president of NEMSPA and Einhorn has served as vice-president.

(3) In 1988, "American Medical News" published an article, "Crusading for Safety," which stated, "Leading the drive for aeromedical safety has become a way of life for Don Wright and Tom Einhorn of the National EMS Pilot's Ass'n." According to the article, appellants' crusade for aeromedical safety *"began more than three years ago."* The article also recounted how appellants "found themselves at the center of a controversy attracting media attention." . . .

(4) Wright testified before a U.S. Senate subcommittee at a hearing on the Employee Health and Safety Whistleblower Protection Act. He stated he was "blackballed" after complaining about unsafe flying conditions at Hermann's Life Flight program.

(5) July, 1985, Wright filed a charge against Hermann Hospital with the National Labor Relations Board contending he was transferred "to more onerous or arduous duties because of his activities and/or membership in behalf of NEMSPA."

(6) Appellants, under the auspices of NEMSPA, developed a publication called "Airnet," which addressed issues of aeromedical safety in general, and the Hermann Hospital Life Flight program in particular.

> (7) After appellants filed their federal lawsuit, their legal actions against Hermann became the subject of much media attention.

(App.-27-28) (emphasis in original).

Without any express reference to the competing legal policies of the First Amendment and the Texas law of defamation, the Court of Appeals concluded that this evidence "clearly" established the Plaintiffs were limited purpose public figures, as a matter of law. Most of the recited facts occurred substantially after the filing of the Plaintiffs' lawsuit. Despite this Court's admonishment that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure," *Hutchinson v. Proxmire, supra,* 443 U.S. at 135, 99 S. Ct. at 2688, the Texas Court of Appeals concluded that facts arising after the Defendants' defamatory remarks helped to conclusively establish that the Plaintiffs were public figures. The Texas Court of Appeals' apparent disregard of this principle contrasts starkly with cases such as *Levine v. CNP Publications, Inc.*, 738 F.2d 660 (5th Cir. 1984), holding that individuals do not become public figures merely because their suits are resolved or openly discussed in a public forum.

The Texas court declined to seriously evaluate whether the dialogue between the Defendants and the Plaintiffs regarding flight safety was "public," in the sense the people other than the immediate participants were discussing it and that other people were likely to feel the impact of its resolution. The Texas court did not seriously consider whether the defamatory remarks were germane to the issue of flight safety. The Texas court

blithely concluded the Plaintiffs were involved in a public controversy without really identifying what that controversy was. The evidence really tended to show that the public became aware of this controversy only after media coverage developed as a result of the Plaintiffs' lawsuit.

These Plaintiffs did not enter into a dispute which was already in the public eye. Rather, they attempted to resolve concerns about flight safety within the Hermann Hospital Life Flight program with their employer. They helped form an organization of pilots who could discuss promoting flight safety among themselves. Actually, the Plaintiffs' professional organization referred to by the Court of Appeals was formed to provide pilots with a private forum in which to express their views and provide professional input on their industry. The organization was not a lobbying or political action group. Although the Texas court purported to follow the painstaking criteria established in *Trotter v. Jack Anderson Enter., Inc.*, 818 F.2d 431 (5th Cir. 1987), the court actually neglected to confront and resolve the delicate balancing of legal policies and failed to carefully adhere to the admonishments of this Court which the parties deserved and the issues demanded. This lapse in the Texas court's legal analysis illustrates the need for this Court to speak on these issues again, especially in the context of defamation by a non-media defendant.

B. Proof of Actual Malice

On remand from the first appeal, the Plaintiffs sought to circumstantially establish the Defendants' actual

malice. The jury and the trial court concluded that the Plaintiffs had met their burden to establish actual malice by clear and convincing evidence, albeit circumstantially. The Texas Court of Appeals reversed that judgment on the basis that Plaintiffs had actually offered no evidence to support a finding of actual malice.

The decision of the Texas court proceeds from two factual determinations made by the Court of Appeals which directly conflict with the findings of the jury: (1) that LaChance believed his statement that the Plaintiffs were engaged in a competitive "conflict of interest," and (2) that LaChance's belief in the existence of the conflict of interest was not unreasonable. The Texas court's references to the Defendants' evidence show that the Defendants persuaded the Court to displace the factfinder by reviewing the legal sufficiency of the evidence to support the verdict in light of the evidence and inferences supporting the Defendants' hypothesis. The Court of Appeals cites the testimony of LaChance and other witnesses associated with LaChance and Hermann Hospital as if those items of evidence were the facts of the case, and the Court of Appeals was authorized to believe that testimony. The Court of Appeals then conclude that the Defendants' hypotheses, grounded in that testimony, was not disproved by clear and convincing evidence from the Plaintiffs.

Normally, when a Texas appellate court reviews such a point of error, it may consider only the evidence and the reasonable inferences that tend to support the findings of the jury, and must disregard all evidence and inferences to the contrary. *State v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994), *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322,

327 (Tex. 1994). Consequently, in reviewing the legal sufficiency of the Plaintiffs' evidence, the Court of Appeals should not have concerned itself with Defendant LaChance's self-serving testimony or the testimony of the Defendants' other witnesses regarding LaChance's subjective beliefs. The jury was entitled to disbelieve those professions of good faith. *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612, 621 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985).

The Defendants persuaded the Court of Appeals to override the fact-finding process, and to adopt as true the testimony which the jury obviously disbelieved, by asserting that the federal constitutional requirement of clear and convincing proof of actual malice fundamentally alters the standard of appellate review. This Court has announced the constitutional duty of an appellate court to ensure that a judgment before it has not breached the First Amendment. However, the duty to review the constitutional sufficiency of evidence in defamation cases is no different from the appellate review of judgments to ensure that they have not breached the bounds of any state law. *See Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 498-506, 104 S. Ct. 1949, 1958-1962, 80 L. Ed. 2d 502 (1984).

The constitutional standard of review must be faithful to the deference which procedural rules accord to factual determinations, as well as the duty to prevent forbidden intrusion on free expression. *Id.*, 466 U.S. at 499, 104 S. Ct. at 1958. The constitutional rule, therefore, permits due deference to the jury's opportunity to observe the witnesses. *Id.*, 466 U.S. at 499-500, 104 S. Ct., at 1959. Consequently,

> a defendant cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story fabricated by the defendant is the product of his imagination, or is based wholly on an unverified anonymous telephone call. . . .

St. Amant v. Thompson, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326, 20 L. Ed. 262 (1968). Were this not the law, then perjury would be a complete defense to a defamation claim.

The Plaintiffs' evidence was sufficient to permit the conclusion that LaChance entertained serious doubts as to the truth of his statement because it showed that LaChance's anger with the Plaintiffs turned to venomous vendetta, an obsession with getting even with the Plaintiffs for stirring up trouble at the Hermann Hospital Lifeflight program. That obsession motivated LaChance, and it was so intense that it overrode any regard for falsity or harm. LaChance vented his anger at the Plaintiffs by threatening their jobs and careers and vehemently maligning them on every occasion which presented itself or which he could create. He saw to it that his threats were carried out just as soon as he satisfied himself that he had collected enough empirical data to convince others that he was acting on some rational basis. These facts tell the circumstantial story of actual malice.

The opinion of the Court of Appeals here represents a rather remarkable departure from Texas law's traditional

treatment of the quality of circumstantial evidence, grounded in a misunderstanding of its constitutional obligation to perform an independent review of the sufficiency of the evidence to establish actual malice. "By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993). This linking of circumstances is the process of fact finding, and it may include consideration of evidence which appellate court judges would have discounted, had they been jurors. *Id.*, at 928. Except in those rare instances when the art of cross-examination produces a sobbing confession from the witness stand, a bad intent must be proved circumstantially. *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612, 621 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009. *Cf. St. Amant v. Thompson, supra*. The Plaintiffs' evidence here did establish a pattern of acts and events which tended to show that LaChance was guilty of actual malice, and the Court of Appeals erroneously re-performed the fact-finding process in discounting the evidence and inferences the jury used to reach their conclusion.

To be sure, a defendant's protestations of good faith or innocence may persuade a jury that the evidence of malice is less than clear and convincing, but only if the jury finds his testimony persuasive. If, on the other hand, the jury sees through his feigned righteousness and recognizes the true character within, they should be empowered to draw the inferences from the plaintiff's evidence which show the defendant acted with actual malice and to render their verdict accordingly. Such is the

lesson, here unheeded, of *Bose Corp. v. Consumers Union, supra,* and *St. Amant v. Thompson, supra.*

If LaChance's animosity motivated him to defame the Plaintiffs, actual malice is shown. As the lower Court's recital of the permissible inferences from the evidence would indicate, LaChance decided and intended to defame the Plaintiffs, and he did so as soon as he felt that he had collected some two or three facts which would serve to camouflage his true motives. This course of conduct explains why the statements made were false, notwithstanding LaChance's self-serving claim that he had persuaded himself from his "investigation" that these facts were true.

The Court of Appeals inferred from the *Defendants'* evidence that LaChance had a reasonable basis for a subjective belief in his defamatory remarks. The jury inferred from the *Plaintiffs'* evidence that LaChance did not entertain any such defensible belief in what he said. The jury resolved the conflict by watching and hearing LaChance testify and then disbelieving his story. In fact, the jury not only believed that LaChance was guilty of actual malice, but that LaChance's conduct and culpability, in light of the situation and sensibilities of the parties, so offended their sense of justice and propriety as to justify the symbolic imposition of exemplary damages. (2 Tr. 454-455.) The Court of Appeals should not have second-guessed that fact-finding prerogative under the mistaken belief that the First Amendment required the Court to do that.

CONCLUSION

For the reasons stated, Thomas Einhorn and William D. Wright pray that this Court grant this petition and review the decision of the Court of Appeals for the First District of Texas.

Respectfully submitted,

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Judgment reversed and rendered and
Opinion filed March 30, 1995

[LOGO]

In The
Court of Appeals
For The
First District of Texas

NO. 01-94-00180-CV

WILLIAM LaCHANCE AND HERMANN HOSPITAL,
Appellants

V.

THOMAS EINHORN AND WILLIAM D. WRIGHT,
Appellees

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 88R2517

OPINION

Appellants (LaChance and Hermann Hospital) challenge a judgment in favor of appellees (Einhorn and Wright) in a slander case tried to a jury. The issue this Court must decide is whether Einhorn and Wright presented sufficient evidence to show that LaChance made a defamatory statement about them with actual malice.

Factual Background

In 1976, Hermann Hospital contracted with Evergreen Aviation to provide Life Flight services for the hospital. In 1982, Hermann Hospital formed its own Life Flight program and contracted with other hospitals to provide services to those hospitals.

Einhorn and Wright were Life Flight pilots who worked in Hermann Hospital's program from 1982 until 1986. During their employment, they became involved in a dispute with Hermann Hospital regarding the hospital's policies of overtime compensation and safety regulations.

In August 1984, Einhorn and Wright organized an international professional organization for Life Flight pilots, the National Emergency Medical Service Pilots Association (NEMSPA), to deal with ongoing safety problems in the airborne emergency medical industry. In February 1985, Einhorn and Wright wrote a letter to Hermann Hospital management expressing their concerns regarding the Hermann Life Flight program.

Einhorn and Wright were fired on January 21, 1986. They contended that they were terminated and discredited by Hermann Hospital in an attempt to stifle their protest and to prevent exposure of Hermann Hospital's alleged numerous illegal actions.

LaChance and Hermann Hospital contended that Einhorn and Wright were fired because a "conflict of interest" arose when Einhorn and Wright cooperated with the University of Texas Medical Branch's (UTMB) efforts

to set up a fixed-wing (as opposed to rotary wing) ambulance service that would compete with Hermann Hospital's own fixed-wing service.

Einhorn and Wright protested their firing before the National Labor Relations Board (NLRB). The NLRB found that Einhorn and Wright had failed to prove their discharge was for reasons other than those advanced by Hermann Hospital.

Procedural History

Einhorn and Wright filed suit in federal court against LaChance and Hermann Hospital. The federal district court granted summary judgment in favor of LaChance and Hermann Hospital on all causes of action. The Fifth Circuit affirmed in part, but reversed the summary judgment on the state law defamation claims for lack of jurisdiction. Einhorn and Wright then filed suit in state district court and alleged several counts of defamation. After the district court granted summary judgment in favor of LaChance and Hermann Hospital on all claims, Einhorn and Wright brought their first appeal to this Court. This Court affirmed the summary judgment on all grounds except for a single slander claim, based upon a single statement, which was remanded for trial. *See Einhorn v. LaChance*, 823 S.W.2d 405, 414 (Tex. App. – Houston [1st Dist.] 1992, writ dism'd w.o.j.). The case went to trial on the single remaining slander claim. The jury found in favor of Einhorn and Wright, and awarded each $250,000 in actual damages and $1 in exemplary damages. The present appeal followed.

Actual Malice

In the single remaining defamation claim, Einhorn and Wright contended that LaChance, Hermann Hospital's director of aviation management, defamed them by informing Dr. Strothert of UTMB that Einhorn and Wright had been fired because they had a "conflict of interest" with Hermann Hospital. In our previous opinion in this case we held that this statement was reasonably capable of a defamatory meaning. *Einhorn*, 823 S.W.2d at 411. We further held that Einhorn and Wright were "limited-purpose public figures" because they had voluntarily injected themselves into a particular public controversy. *Id.* at 413-14. As limited-purpose public figures, Einhorn and Wright were required to prove, by clear and convincing evidence, that LaChance made the defamatory statement with actual malice. *Id.* at 414.

In their first point of error, LaChance and Hermann Hospital contend that the evidence is insufficient to show that the defamatory statement was made with actual malice.

Actual malice defined

Actual malice, as used in defamation cases, is a term of art that is separate and distinct from traditional common-law malice. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968); *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard for whether it is true. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328, 94 S.Ct. 2997, 3001 (1974); *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989).

Reckless disregard is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325; *Casso*, 776 S.W.2d at 558; *Carr*, 776 S.W.2d at 571. Liability turns not on the extent of the hatred, hostility, spite or intention to harm that the defendant bears for the plaintiff, but on his subjective evaluation of the accuracy of the statements he publishes to serve his motives. *Bartimo v. Horsemen's Benev. and Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119, 106 S.Ct. 1635 (1986). It is not enough for the jury to disbelieve defendant's testimony; the plaintiff must offer clear and convincing affirmative proof to support a recovery. *Casso*, 776 S.W.2d at 558. It is the plaintiff's burden to demonstrate the state of mind of the defendant at the time the statement was published. *Breen v. DeLord*, 723 S.W.2d 166, 170 (Tex. App. – Austin 1987, no pet.) The defendant's state of mind may be proved by circumstantial evidence. *Hall v. Buck*, 678 S.W.2d 612, 621 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009, 105 S.Ct. 2704 (1985). However, such evidence must be clear and convincing. *Einhorn*, 823 S.W.2d at 414. Mere surmise or suspicion of actual malice does not carry the probative force necessary to form the basis of a legal inference of actual malice. *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 450 (Tex. App. – Houston [1st Dist.] 1993, no pet.).

Application of law to facts

The trial court properly charged the jury with the responsibility of answering the following question:

> Do you find by clear and convincing affirmative evidence[1] that the false and defamatory statement was made with knowledge that it was false or made with reckless disregard[2] for whether it was false or not?

The issue this Court must decide is whether Einhorn and Wright met their burden of proving by clear and convincing evidence that LaChance either knew, or had

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[1] The charge defined clear and convincing evidence as:

> that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction that the speaker had knowledge that the statements were false or acted with reckless disregard for whether the statement was false or not. Proof by 'clear and convincing affirmative evidence' is greater than the 'preponderance of the evidence standard', which you will follow in connection with other issues in this charge. Proof by clear and convincing evidence requires proof which is strong, positive, precise, unmistakable, and free from serious or substantial doubt, although it is not necessary that the evidence be completely unequivocal or undisputed.

[2] The charge defined reckless disregard as requiring:

> . . . proof that the false and defamatory statement was made with a high degree of awareness of its probable falsity. There must be sufficient evidence to conclude that the Defendants in fact entertained serious doubts as to the truth of the publication. Reckless disregard require proof of more than personal spite, negligence, or failure to investigate the truth of a statement.

reckless disregard for, the falsity of his "conflict of interest" statement at the time he made it. To do so we must consider the circumstances under which the statement was made.

The record shows that Hermann Hospital had a Life Flight long-distance program that used fixed-wing aircraft. UTMB was a customer of Hermann's service. In 1985, UTMB began considering setting up its own fixed-wing service. Einhorn and Wright were both working for Hermann at this time. Einhorn told Wright that Bayport Aviation was interested in doing charter work with its new plane, a King Air. Wright relayed this information to Dr. Strothert, director of emergency medical services at UTMB. Wright told Dr. Strothert that Bayport was interested in showing its plane to UTMB, and Strothert asked Wright to set up a meeting with Bayport. Einhorn and Wright acted as intermediaries between Bayport and UTMB. Acting on Dr. Strother's request, Wright called Einhorn, who in turn told Bayport about the meeting.

On December 26, 1985, Einhorn and representatives of Bayport flew to Galveston to meet with Strothert and representatives of UTMB. Wright was also present at the meeting. Einhorn and Wright attended the meeting in order to introduce UTMB and Bayport to each other. During the meeting, Strothert and the other representatives of UTMB examined Bayport's airplane to determine if it was suitable for patient transportation. Einhorn, Wright, and the representatives of UTMB and Bayport then went out to dinner. At the end of the meeting, Strothert told Wright he wanted a written proposal from Bayport. Wright relayed this information to Einhorn, who passed it along Bayport.

On December 30, 1985, four days after the meeting, Einhorn and Wright applied for, and received, an assumed name certificate under the name Associated Aviation Consultants.

A few weeks later, Wright picked up Bayport's proposal and delivered it to Strothert; Wright's name appeared on the proposal. After delivering the proposal to UTMB, Wright talked with Strothert's assistant, Dr. Robert Mecker, about whether the proposal asked a fair price.

There is nothing in the record to show that Einhorn and Wright ever received any compensation for acting as "intermediaries." Einhorn and Wright never informed LaChance or Hermann of their involvement in UTMB's efforts to set up a fixed-wing ambulance service.

From his chief pilot, Steve Kinnamon, LaChance heard rumors of the involvement of Einhorn and Wright with UTMB. He then discovered that Einhorn and Wright had received the assumed name certificate. LaChance called Mike Beaumont of Bayport Aviation to corroborate the rumors of Einhorn and Wright's involvement in the proposal with UTMB. LaChance learned from Beaumont that Einhorn and Wright had told Beaumont that UTMB was interested in setting up a fixed-wing program.

The day after LaChance spoke with Beaumont, Einhorn and Wright were terminated; they were informed that they had been fired because of a conflict of interest. When Strothert learned that Einhorn and Wright had been fired, he called LaChance to find out what was going on. In response to a question by Strothert, LaChance informed him that Einhorn and Wright had

been fired because of a "conflcit of interest." It is this "conflict of interest" statement that gives rise to this litigation.[3]

Einhorn and Wright rely on four factors to show that LaChance made the "conflict of interest" statement with knowledge of its falsity or reckless disregard for its truth. They rely on: (1) the statement's falsity; (2) evidence of LaChance's ill will towards them; (3) LaChance's failure to investigate the statement before it was made; and (4) LaChance's lack of a "business purpose or personal need to make the remark."

(1) Falsity

The first factor relied on by Einhorn and Wright, the falsity of the statement, is not sufficient to establish actual malice. *See Breen*, 723 S.W.2d at 170. The jury found that the "conflict of interest" statement was false, and this finding is not challenged on appeal. The issue before this Court is not whether the statement was false, however, but whether LaChance *believed* it was false. Proof of falsity in fact is not enough to establish actual malice, nor is proof of a combination of falsehood and general hostility. *Seidenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100, 1104 (5th Cir. 1985).

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[3] At the time of trial Strothert testified that he did not even remember having a conversation with LaChance.

(2) Ill Will

Einhorn and Wright relied heavily on LaChance's ill will toward them to establish actual malice. They presented considerable evidence to show that LaChance considered them troublemakers because of their involvement in bringing safety issues to the public's attention, and organizing a pilot's "union." After Einhorn and Wright, along with the other Life Flight pilots, wrote a letter to Hermann's administration complaining of "a major compromise of safety," LaChance "hit the ceiling" and blamed Einhorn and Wright for the letter. He told Einhorn that the pilots were in a lot of trouble and "were a sports car on a collision course with a Mack Truck."

After writing the letter, Einhorn and Wright's work evaluations, which were previously good, were lowered drastically. There is also evidence that, on various occasions, LaChance called Einhorn and Wright liars and incompetent pilots, using foul language for emphasis.

On the other hand, LaChance testified that at the time he made the statement, and even on the date of trial, he believed that there was a conflict of interest. In addition to LaChance's testimony, Steve Kinnamon, the chief pilot for Hermann at the time, testified that he believed that there was a conflict of interest. Another pilot, Hugh Boddecker, testified that at the time of the incident he, too, believed that there was a conflict of interest. Kinnamon also testified that LaChance expressed no serious doubts whether a conflict existed. LaChance's supervisor, Ronald Stutes, also testified that LaChance "seemed pretty sure of his information."

LaChance knew of Einhorn and Wright's involvement with Bayport and UTMB, and that they had filed an assumed name certificate for an aviation consulting business. He told Einhorn and Wright that they were fired because of a conflict of interest. LaChance, Kinnamon, and Stutes all testified that LaChance *believed* that a conflict existed. After considering the evidence, we cannot say that LaChance's belief, that at least some conflict of interest[4] existed, was unreasonable.

The supreme court recently went out of its way to emphasize the distinction between actual malice and ill will, spite or evil motive. *See Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 772 (Tex. 1994). Actual malice is qualitatively different from, not merely quantitatively greater than, ill will. While the record contains abundant evidence of LaChance's ill will toward Einhorn and Wright, we find that such ill will does not give rise to an inference of actual malice, *i.e.*, knowledge that the statement was false, or at least reckless disregard for whether the statement was false.

(3) Failure to investigate

Einhorn and Wright also argue that LaChance's failure to adequately investigate the statement before he made it, gives rise to an inference of malice. Einhorn and Wright complain that LaChance never asked them or UTMB about their involvement in the deal between Bayport and UTMB, or looked for any written materials

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[4] We observe that "conflict of interest" was not defined in the trial court's charge.

that would indicate the plaintiffs' "competing" business had made a proposal to UTMB. However, in *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969), the supreme court held that an utter failure to investigate amounted to no evidence of malice. In *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 901 (Tex. 1970), the supreme court held that a failure by the defendant to perform verification required by its own standards was no evidence of conscious doubt as to the truth of the statement. Finally, in *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984), the supreme court refused to find actual malice because the defendant presented considerable evidence to show that it exercised the degree of care proper for a reasonable publisher.

We find that LaChance's investigation, or lack thereof, is not evidence that he doubted the truth of the statement. Furthermore, there is evidence that LaChance *did* perform an investigation before he made the statement. LaChance testified that he first heard rumors of Einhorn and Wright's involvement with UTMB from his chief pilot, Steve Kinnamon. Kinnamon also gave LaChance information about the meetings Einhorn and Wright had with UTMB. LaChance then discovered that Einhorn and Wright had filed an assumed name certificate that indicated they intended to go into the aviation consulting business. Finally, LaChance called Mike Beaumont of Bayport Aviation, who admitted that Einhorn and Wright had told him of UTMB's interest in setting up a fixed-wing ambulance service program.[5] The evidence

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[5] After Einhorn and Wright were fired, LaChance attempted to memorialize this conversation with Beaumont by

concerning the investigation conducted by LaChance does not create the inference that he made the statement with knowledge of falsity or reckless disregard.

(4) Lack of a need to make the statement.

Finally, Einhorn and Wright argue that LaChance had no legitimate purpose in publishing the statement, and that this gives rise to an inference of malice. However, the record does not show that LaChance made the statement gratuitously, or purely out of spite. Strothert called LaChance to ask why Einhorn and Wright had been fired. LaChance then made the statement that they had been fired because they had a conflict of interest with Hermann Hospital; this is the same reason he had given Einhorn and Wright at the time of their termination. LaChance did not seek out Strothert; Strothert called LaChance. LaChance's personal purpose in making the staement was to answer Strother's inquiry, and it does not imply that he did not believe the truth of the statement.

(5) Combination of factors

At oral argument, Einhorn and Wright emphasized that, while the various factors upon which they relied were not each sufficient alone to prove actual malice

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having him sign a statement, which Beaumont refused to do. Because Beaumont refused to sign the statement *after* LaChance made the "conflict of interest" statement to Strothert, it has no bearing on LaChance's state of mind at the time the defamatory statement was made.

circumstantially, the combination of all of these factors was sufficient to support the jury's verdict. LaChance and Hermann Hospital argued that, where each of the factors provided *no proof* of actual malice, the sum of the parts was no greater than the parts (the sum of four zeros is zero).

Looking at all of the evidence in the light most favorable to the jury's verdict, the jury could very well have found that:

> (1) LaChance had abundant animosity toward Einhorn and Wright that provided a motive for LaChance both to find a reason to fire, and to defame, Einhorn and Wright;
>
> (2) Such a motive may have also inspired LaChance to cease investigating after finding only two or three facts that supported his stated reason for firing Einhorn and Wright;
>
> (3) LaChance was wrong in his conclusion that Einhorn and Wright had a conflict of interest with Hermann Hospital;[6] and
>
> (4) When someone asked the reason for firing Einhorn and Wright, LaChance seized the opportunity to spread the word that Einhorn and Wright had a conflict of interest with Hermann Hospital.

We find that there is nothing in the combination of all of these factors that proves that LaChance knew that his statement about Einhorn and Wright having a conflict of

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[6] Again, appellants do not attack the jury finding to this effect, and we therefore presume the evidence supports such a finding.

interest with Hermann Hospital was false. Nothing even proves that LaChance acted in reckless disregard for the truth in making the statement. While each, and all, of the factors had the potential to help prove the knowledge or reckless disregard of LaChance, they could have done so only in combination with evidence that proved directly, or circumstantially, the ultimate fact of actual malice. We find no such evidence in the record.

Conclusion

After reviewing the entire record of this case, we find no evidence to indicate that LaChance disbelieved, or even entertained a doubt as to, the truth of the "conflict of interest" statement at the time he made it. *A fortiori,* appellees have failed to prove actual malice by clear and convincing evidence. Because we sustain appellants' first point of error, we need not address their remaining arguments, and we decline to do so.

We reverse the judgment of the trial court and render judgment that Einhorn and Wright take nothing.

/s/ Tim Taft
Tim Taft
Justice

Justices Cohen and Mirabal also sitting.

Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered MAR. 30 1995
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

Motion for Rehearing denied, Judgment affirmed in part and reversed and remanded in part, and Opinion filed January 16, 1992

(SEAL)

In The

Court of Appeals

For The

First District of Texas

NO. 01-90-00769-CV

THOMAS EINHORN AND WILLIAM D. WRIGHT, Appellants

V.

WILLIAM LACHANCE, Individually and in his official capacity as Director of Aviation Management, Hermann Hospital Estate; E. DON WALKER, individually and in his official capacity as President of Hermann Hospital Estate; RON STUTES, individually and in his capacity as Chief Operating Officer of Hermann Hospital; THE HERMANN TRUST f/k/a HERMANN HOSPITAL ESTATE, by and through its Trustees, RALPH L. O'CONNOR, WALTER MISCHER, JR., EDWARD RANDALL, III, LEONEL CASTILLO, JOHN CHASE, MELINDA PERRIN, AND MARK WHITE, Appellees

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On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 88R2517

OPINION ON MOTION FOR REHEARING

Appellants have filed a motion for rehearing. We overrule the motion. However, we withdraw our earlier opinion dated October 24, 1991, and substitute this opinion in lieu thereof.

Thomas Einhorn and William D. Wright appeal from a summary judgment in favor of defendants/appellees, William LaChance, individually and in his official capacity as the Director of Aviation Management, Hermann Hospital Trust, E. Don Walker, individually and in his official capacity as President of Hermann Hospital Trust, Ron Stutes, individually and in his capacity as the chief operating officer of Hermann Hospital, and the Hermann Hospital Trust by and through its trustees ("Hermann Hospital").

In 1976, Hermann Hospital contracted with Evergreen Aviation to provide Life Flight services for the hospital. In 1982, Hermann Hospital formed its own Life Flight program and contracted with other hospitals to provide services to those hospitals.

Einhorn and Wright were life flight pilots who worked in Hermann Hospital's program from 1982 until 1986. During their employment, they became involved in a dispute with Hermann Hospital regarding the hospital's policies of overtime compensation and safety regulations.

In August 1984, appellants organized an international professional organization for Life Flight pilots, the National Emergency Medical Services Pilots Association (NEMSPA), to deal with ongoing safety problems in the airborne emergency medical industry. In February 1985,

appellants wrote a letter to Hermann Hospital management expressing their concerns regarding safety in the Hermann Life Flight program.

Appellants were fired on January 21, 1986. Appellants contend that they were terminated and discredited by Hermann Hospital in an attempt to stifle their protest and to prevent exposure of Hermann Hospital's alleged numerous illegal actions. They protested their firing to the National Labor Relations Board, which concluded that appellants did not sustain their burden of establishing that they were discharged for reasons other than those advanced by Hermann. On September 4, 1986, appellants filed a $6.3 million suit in the United States District Court for the Southern District of Texas in which they asserted that the defendants' actions violated several federal and state statutes. In that suit, appellants raised the state law defamation claims that resulted in this appeal.

On August 8, 1988, the United States District Court granted summary judgment in favor of the defendants on all claims. Except for the allegations of defamation, the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment. Severing the defamation claims from all the other claims, the fifth circuit reversed the judgment concerning that claim, and remanded the defamation claims to the federal district court. That court dismissed the case without prejudice because of lack of jurisdiction.

On December 12, 1989, appellants filed this action in the state court alleging, as defamatory, the following seven statements:

(A) On January 22, 1986, LaChance allegedly made a statement to a Dr. Strother of Galveston UTMB Hospital "relating to misrepresentation of conflicts of interest plaintiffs allegedly had with a [Hermann Hospital] fixed-wing program that never existed."

(B) On February 20, 1985, LaChance allegedly stated to a Floyd Helm that "Einhorn and Wright were attempting to form a union."

(C) On February 20, 1985, LaChance allegedly told a Larry Adams that "Einhorn and Wright were attempting to form a union."

(D) On January 20, 1987, LaChance allegedly told R. Gradison of the ABC television network that, "Einhorn and Wright were incompetent [Life Flight] pilots and troublemakers."

(E) In January 1987, LaChance allegedly made some unspecified statements "to K. Norton and others defaming the professional skills and character of Einhorn and Wright."

(F) In the spring of 1986, LaChance allegedly told L. Adams that LaChance "had gotten rid of troublemakers Einhorn and Wright."

(G) A statement on March 8, 1989, made to reporters for the Houston Post, the Houston Chronicle, and wire services that plaintiff Wright was fired for reasons relating "solely to work performance."

On February 5, 1990, appellees filed their first amended motion for summary judgment, and as a basis thereof asserted the following:

(1) There is no summary judgment evidence that the defamatory statements were made (applicable to statements D and F);

(2) The alleged statements are incapable of defamatory meaning as a matter of law (applicable to statements A, B, C, and G);

(3) The alleged statements are substantially true (applicable to statements B and C);

(4) The alleged statements are constitutionally protected opinion (applicable to statements D, E, and F); and

(5) There is no evidence of actual malice, a required element of a public figure plaintiff's proof (applicable to statement A, B, C, D, E, F, and G).

To support their motion, appellees introduced summary judgment evidence consisting of 25 exhibits, including LaChance's affidavit in which he:

(1) denied making any statement concerning the pilots which he knew to be false;

(2) denied making any statement concerning the pilots about which he entertained serious doubts as to its truth;

(3) affirmed and supported his belief that Wright and Einhorn were assisting in the establishment of a fixed wing ambulance service in competition with Hermann Hospital, a direct conflict of interest;

(4) affirmed and supported his belief that Wright and Einhorn were attempting to form a union or similar organization for EMS pilots;

(5) explained that his comments to Ken Norton regarding Wright and Einhorn were based on his belief that the two pilots were using NEMSPA as a forum for their personal vendetta against Hermann;

(6) affirmed and supported his belief that Wright and Einhorn were "liars," based among other things on false statements made by Wright and Einhorn in their federal complaint; and

(7) affirmed and supported his belief that Wright and Einhorn were "incompetent [Life Flight] pilots," based on Wright's negligence in a 1983 helicopter crash, the plaintiffs' poor work performance at Hermann, and their conflict of interest in setting up a competing business.

On May 29, 1990, the trial court granted summary judgment for appellees. However, the order did not specify any grounds on which the court relied to grant the motion.

A defendant who moves for summary judgment has the burden of showing as a matter of law that no material issue of fact exists for the plaintiff's cause of action. *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 166-67 (Tex. 1987). This may be accomplished by defendant's summary judgment evidence showing that at least one element of plaintiff's cause of action has been established conclusively against the plaintiff. *Gray v. Bertrand*, 723 S.W.2d 957, 958 (Tex. 1987). A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any theories pled. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983).

In Texas, summary judgment may be based on "uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and *could have been readily controverted.*" TEX. R. CIV. P. 166a(c) (emphasis added); *Casso v. Brand*, 776 S.W.2d 551, 559 (Tex. 1989). An affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); TEX. R. CIV. P. 166a(f). The affidavit itself must set forth facts and show the affiant's competency, and the allegations contained in the affidavit must be direct, unequivocal, and such that perjury is assignable. *Keenan v. Gibraltar Sav. Ass'n*, 754 S.W.2d 392, 394 (Tex.App. – Houston [14th Dist.] 1988, no writ). Affidavits may not be based on hearsay. *Lopez v. Link*, 757 S.W.2d 449, 451 (Tex. App. – Houston [14th Dist.] 1988, no writ). However, inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay. *Dolenz v. A. B.*, 742 S.W.2d 82, 83-84 n. 2 (Tex. App. – Dallas 1987, writ denied).

When, as in this case, a trial court's order granting summary judgment does not specify the grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). Thus, we must consider whether any of the grounds asserted by defendants supports the summary judgment.

NO SUMMARY JUDGMENT EVIDENCE THAT THE DEFAMATORY STATEMENTS TO GRADISON AND ADAMS WERE MADE (APPLICABLE TO STATEMENTS D AND F)

In an affidavit, LaChance states:

> I may have mentioned that Wright and Einhorn had attempted to cause trouble for the hospital before by their baseless complaints to governmental agencies such as the FAA. However, at no time during this interview [with Gradison] did I ever state that Wright and Einhorn were 'incompetent LF pilots,' 'troublemakers,' or words to that effect.

In another affidavit, Einhorn presents hearsay evidence that controverts LaChance's denial:

> I have been told that LaChance . . . told Larry Adams that he had gotten rid of the troublemakers (i.e., Don Wright and myself).
>
> Robin Gradison told me that LaChance stated in her interview of LaChance that Don Wright and I were incompetent Life Flight pilots and troublemakers.

Although affidavits supporting and opposing motions for summary judgment must "set forth such facts as would be admissible in evidence . . . [d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection. . . ." Tex. R. Civ. P. 166a(f). Because appellees did not object to Einhorn's affidavit, they waived any complaint concerning inadmissible evidence as part of the summary judgment record. In reviewing a summary judgment record, a court cannot consider evidence that favors the movant's

position unless it is uncontroverted, and evidence favorable to the nonmovant will be taken as true. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985). Thus, the trial judge could not have relied on this ground for its summary judgment ruling.

THE ALLEGED STATEMENTS REGARDING THE PILOTS' ALLEGED CONFLICT OF INTEREST, UNION ACTIVITIES, AND REASON FOR TERMINATION ARE INCAPABLE OF DEFAMATORY MEANING AS A MATTER OF LAW (APPLICABLE TO STATEMENTS A, B, C, AND G)

A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986). Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987). The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *Id.* Only when the court determines the language is ambiguous or of doubtful import should the jury then decide the statement's meaning and the effect the statement's publication has on an ordinary reader. *Id.*

The general rule is "oral words though false and opprobrious are not actionable without pleading and proof of special damages." *Buck v. Savage*, 323 S.W.2d 363, 368 (Tex. Civ. App. – Houston 1959, writ ref'd n.r.e.). However, an exception to this general rule is that words

not otherwise actionable per se sometimes become actionable if they refer to a person engaged in a particular business or profession, where they charge him with fraud, indirect dealings, or incapacity, and tend to injure him in his trade, occupation, employment, or business. *Id.* Because LaChance's statement to Dr. Strother charged appellants with indirect dealing, this statement fits within the exception. Therefore, statement A only is capable of defamatory meaning as a matter of law.

Appellants claim that LaChance's statements, that they were "attempting to form a union" (statements B and C), were defamatory because of the airborne emergency medical services (EMS) industry's prejudice against unions and union activity. Appellants rely on the affidavit of Michael Burke, chairman of the board of NEMSPA, in which he states:

> When a pilot is accused of being or represented by an operator to be a union member, sympathizer, or organizer, the claim negatively impacts the individual in his or her ability to obtain or maintain employment as an EMS pilot. Within the industry, the individual who is accused or represented to be a part of union activities will find it difficult, if not impossible, to find employment in the airborne EMS industry.

However, the reaction of Burke is not typical of the meaning an ordinary person would impute to the statements. Organizing a union is a right protected by federal law, not a crime or unethical act. Therefore, as a matter of law, statements B and C were not defamatory.

Wright complains that the statement that he was fired for reasons relating "solely to work performance" was defamatory. Because the statement complained of is non-specific, statement G is not capable of a defamatory meaning.

The granting of summary judgment was proper as to statements B, C, and G.

THE ALLEGED STATEMENTS CONCERNING APPELLANTS' ATTEMPTS TO FORM A UNION ARE SUBSTANTIALLY TRUE (APPLICABLE TO STATEMENTS B AND C)

Because we have determined that these statements were not capable of defamatory meaning, as a matter of law, this ground does not have to be addressed.

THE ALLEGED STATEMENTS ARE CONSTITUTIONALLY PROTECTED OPINION (APPLICABLE TO STATEMENTS D, E, AND F)

The line between absolutely privileged opinion and actionable assertions of fact are questions of law for the court. *Yiamouyiannis v. Thompson,* 764 S.W.2d 338, 341 (Tex. App. – San Antonio 1988, writ denied). When the topic is a public issue, speakers may express their opinions about their opponents' views and qualifications without having to prove the substantial "truth" of those opinions in a defamation case. *Id.*

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. *Waldbaum v. Fairchild Publications,*

Inc., 627 F.2d 1289, 1296 (D.C. Cir. 1980). The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976). Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants. *Waldbaum*, 627 F.2d at 1296.

Examination of the summary judgment evidence reveals the following:

> (1) In 1984, prior to appellants' filing suit, appellants, "recognizing that the Hermann Hospital Life Flight program provided not only insufficient compensation to the pilots for the job done, *but also created a very dangerous situation for those pilots and the persons flying with them, as well as others in the community*, organized NEMSPA, an international organization to further their concern for aeromedical safety."

(Emphasis added.)

> (2) Wright has served as president of NEMSPA and Einhorn has served as vice-president.
>
> (3) In 1988, "American Medical News" published an article, "Crusading for Safety," which stated, "Leading the drive for aeromedical safety has become a way of life for Don Wright and Tom Einhorn of the National EMS Pilot's Ass'n." According to the article, appellants' crusade for aeromedical safety *"began more than three years ago."* The article also recounted how appellants "found themselves at the center of a controversy attracting media attention."

(Emphasis added.)

(4) Wright testified before a U.S. Senate subcommittee at a hearing on the Employee Health and Safety Whistleblower Protection Act. He stated he was "blackballed" after complaining about unsafe flying conditions in Hermann's Life Flight program.

(5) July, 1985, Wright filed a charge against Hermann Hospital with the National Labor Relations Board contending he was transferred "to more onerous or arduous duties because of his activities and/or membership in behalf of NEMSPA."

(6) Appellants, under the auspices of NEMSPA, developed a publication called "Airnet," which addressed issues of aeromedical safety in general, and the Hermann Hospital Life Flight program in particular.

(7) After appellants filed their federal lawsuit, their legal actions against Hermann became the subject of much media attention.

This evidence, to which appellants did not object, clearly shows appellants "thrust" themselves into the "vortex" of the public issue involving aeromedical safety and engaged the public's attention in an attempt to influence its outcome.

Under the principles of *Waldbaum* and *Time, Inc.*, the references to appellants as incompetent, troublemakers, and liars are assertions of pure opinion. These terms of derision, considered in context and in light of the EMS debate are not capable of proof one way or the other. Therefore, as to each of these statements, the absolute constitutional privilege applies. *See Waldbaum*, 627 F.2d at 1296; *Time, Inc.*, 424 U.S. at 454-55 (1976).

The granting of summary judgment was proper as to statements D, E and F.

NO EVIDENCE OF ACTUAL MALICE, A REQUIRED ELEMENT OF A PUBLIC FIGURE PLAINTIFF'S PROOF (APPLICABLE TO STATEMENTS A, B, C, D, E, F, AND G)

Because we have determined that statements B, C, and G are not capable of defamatory meaning, as a matter of law, and statements D, E, and F are constitutionally protected opinion, the issue of actual malice pertains only to statement A.

The degree and burden of proof required in a defamation case hinges on the status of the plaintiff as either a public figure or private individual. The parties in this case differ as to how to classify appellants. Appellants classify themselves as private individuals. Defendants conclude that although appellants could not be considered public figures for all purposes, they were public figures for the limited range of issues in this cause of action.

In trying to determine who is a public figure, the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) created two classes of public figures in addition to government officials: general-purpose and limited-purpose public figures. General-purpose public figures are those individuals who "achieve such pervasive fame or notoriety that [they] become a public figure for all purposes and in all contexts." *Id.* Such persons have assumed so prominent a role in the affairs of society that they have become celebrities. *Tavoulareas v. Piro*, 817

F.2d 762, 772 (1987). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society," an individual should not be characterized as a general-purpose public figure. *Gertz*, 418 U.S. at 352. Defendants do not contend that appellants have established this kind of prominence.

Limited-purpose public figures achieve their status by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345, or because they "voluntarily inject [themselves] or [are] drawn into a particular public controversy." *Id.* at 351. Defendants contend that appellants are limited-purpose public figures.

Whether an individual is a public figure is a matter of law for the court to decide. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). To help determine limited-purpose public figure status, the District of Columbia circuit in *Tavoulareas v. Piro* developed a three-step test, which the fifth circuit adopted in *Trotter v. Jack Anderson Enter., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987):

> (1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
>
> (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

In undertaking this examination, this Court must look through the eyes of a reasonable person at the facts

taken as a whole, *Waldbaum*, 627 F.2d at 1292, and determine the status of appellants as either public or private individuals.

As set out above, appellants were involved in a public controversy. Therefore, the first prong of *Trotter*, requiring a public controversy, was met. It is apparent that appellants had more than a trivial role in the controversy; thus, the second requirement of *Trotter* was met. Because there is no dispute that the allegedly defamatory statements were germane to appellants' participation in the controversy, the third requirement of *Trotter* was satisfied. Consequently, the trial judge could have found that appellants, by voluntarily injecting themselves into a particular public controversy, became limited-purpose or "vortex" public figures.

Although an injured party who is not a public official or public figure only has to prove that the defendants were negligent in making a defamatory statement, *Durham v. Cannon Communications, Inc.*, 645 S.W.2d 845, 851 (Tex. App. – Amarillo 1983, writ dism'd), in order for a public figure to sustain a defamation cause of action, he must prove that the defendants acted with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Proof of actual malice must be by clear and convincing evidence. *Gertz*, 418 U.S. at 342. Actual malice means the statement was made with knowledge of its falsity, or with reckless disregard for its truth or falsity. *New York Times*, 376 U.S. at 280. "Reckless disregard" is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts about the truth of his publication."

Id. Although the United States Supreme Court has not decided whether this standard is also constitutionally required when public figures sue private individuals for defamation, the Texas Supreme Court, in a defamation action, *Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989) stated, "We are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens. . . . Therefore, we join those states which have extended the *New York Times* standard to defamation suits by public officials and public figures against non-media defendants."

Because we have determined that appellants are limited-purpose public figures, it was incumbent upon them to show, by clear and convincing evidence, that, in his conversation with Dr. Strother, LaChance acted with actual malice.

In his affidavit, LaChance denied making any statement concerning the pilots that he knew to be false, denied making any statement about which he entertained serious doubts concerning its truth, and provided information concerning his knowledge that the statements were not false. He stated that his belief that appellants were involved in a conflict of interest was based on a conversation he had with Mike Beaumont, the manager of Bayport Aviation, a commercial aircraft vendor, in which Beaumont acknowledged that appellants had approached him with the idea of setting up a fixed-wing air ambulance service. However, appellants presented Beaumont's "sworn statement," which was not objected to by appellees, in which he stated:

> LaChance came to my office. No one else was present. He said that Hermann had just fired Einhorn and Wright for "conflict of interest." He then said, 'I called you yesterday for a specific reason. I had my attorney on the line listening, and I have a statement of what you told us. I have this statement here and I'd like you to sign it.' He then showed me a one page typed statement. I read it and it stated that I had discussed with Einhorn and Wright about actually setting up a "fixed-wing operation." (In fact, all Einhorn and Wright had discussed with me, was to relay information that Sealy was interested in contracting out a fixed-wing service.) I told LaChance that because the statement he prepared implied that Wright and Einhorn were directly involved in setting up the fixed-wing service, I told LaChance that I would not sign the statement he had prepared. . . . I wish to state that although Einhorn and Wright attended the December 26, 1985 meeting I had with Dr. Strother, they did not participate in any of the conversation regarding the presentation of the Bayport program.

Such testimony contradicts LaChance's testimony that he did not make any statements with knowledge of the falsity of the statment [sic] or with reckless disregard for the truth or falsity of the statement. Concerning statement A, appellants raised a fact question on the issue of actual malice.

The granting of summary judgment was not proper as to statement A.

The judgment of the trial court is affirmed regarding statements B, C, D, E, F, and G. Regarding statement A,

the judgment of the trial court is reversed and remanded for further proceedings.

/s/ Frank C. Price
FRANK C. PRICE[1]
Justice

Justices Bass and Dunn also participating.
Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered JAN 16 1992
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

---

[1] The Honorable Frank C. Price, former justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

[SEAL] **FIRST COURT OF APPEALS**
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Official Business [POSTMARK]
State of Texas April 27, 1995
State Penalty

RE: Case No. 01-94-00180-CV

Style: LaChance, William and Herman Hospital
v. Thomas Einhorn and William D. Wright

On this day came on to be considered the Appellee's(s) motion for rehearing. And such motion is hereby OVERRULED.

T.C. Case # 88R2517 Margie Thompson, Clerk

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THE SUPREME COURT OF TEXAS
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RE: Case No. D-2123

Style: THOMAS EINHORN AND WILLIAM D. WRIGHT
v. WILLIAM LACHANCE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Sincerely,
JOHN T. ADAMS, Clerk

by /s/ Courtland Crocker
Courtland Crocker, Deputy

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
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November 16, 1995

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RE: Case Number 95-0571
Style: THOMAS EINHORN and WILLIAM D. WRIGHT
v.
WILLIAM LACHANCE and HERMANN HOSPITAL

Deal Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

No. 95-1279

In The

Supreme Court of the United States

October Term, 1995

THOMAS EINHORN and WILLIAM D. WRIGHT,

Petitioners,

v.

WILLIAM LaCHANCE and HERMANN HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari
To The First Court Of Appeals Of Texas
Houston, Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Texas court of appeals concluded that these defamation plaintiffs were limited-purpose public figures because they not only thrust themselves into a public controversy, but in fact created the controversy. Accordingly, at trial the plaintiffs conceded that Texas and federal law required them to prove by clear and convincing evidence that the defendants had acted with actual malice. Despite their concession, can they in this Court challenge the application of that settled law to their slander claim?

2. Whether the Texas appellate court correctly concluded that the evidence in this slander case fell short of being sufficiently clear and convincing to prove actual malice under settled Texas and federal law?

3. Whether Texas and federal law would entitle defamation plaintiffs who suffered no actual injury as a result of the alleged slander to uphold a jury verdict for $500,000?

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MISCELLANEOUS

Ten Years of "Independent Appellate Review" in Defamation Cases, LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 2 6

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, William LaChance and Hermann Hospital, oppose the petition for writ of certiorari filed by petitioners, Thomas Einhorn and William D. Wright.

STATEMENT OF THE CASE

The opinions of the courts of appeals, reprinted in the appendix to the petition for writ of certiorari, correctly state the facts necessary to understand the questions presented. Any necessary specific clarifications of the record will be made in the argument section of this response.

REASONS FOR DENYING THE WRIT

1. This case was decided under both Texas and federal constitutional law. As literally worded and repeatedly interpreted by the Texas Supreme Court, the Texas Constitution gives decidedly more protection to freedom of speech than does the First Amendment to the United States Constitution. TEX. CONST., art. I, § 8; *see Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *O'Quinn v. State Bar*, 763 S.W.2d 397, 402 (Tex. 1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988). This independent and adequate state ground for the lower court's decision suggests that this Court should not invest its limited resources in this particular controversy.

2. The petitioners did not object to the charge submitted to the jury, which under controlling Texas procedural law indicates their complete agreement with the legal principles it contains. 8 S.F. 92. *See, e.g., Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604 (Tex. 1964). Thus, the petitioners agreed to the submission of an "actual malice" standard in the terms approved by the Texas Supreme Court and this Court. They also agreed not to have the jury consider circumstantial evidence. This procedural rule of waiver is not designed to frustrate the assertion of federal rights, for here the federal and Texas rights of free speech were vindicated by the state appellate court. But the waiver suggests that this is probably not the most appropriate case in which to revisit settled legal rules or to create new rules.

3. The petitioners' real complaint is with the application of the facts to the law, not the law itself. Pet. at 14-20. The legal principles are well settled, as is the standard of review. This Court has no especial reason to review the lower court's treatment of the facts under Texas procedural law, since the Texas and federal constitutional guarantee has been vindicated, rather than frustrated, by the state appellate court.

4. The court of appeals reached a correct decision under Texas and federal law in accordance with settled legal principles that are not in need of revision. The petitioners fail to demonstrate a burning conflict among the lower courts about these issues.

5. Because of its consistency with well settled Texas law, the opinion of the court of appeals was ordered unpublished, which prevents its being cited as authority.

App. 15; *see* TEX. R. APP. P. 90(d). Thus, the decision below is unlikely to assume national importance.

6. The petitioners failed to prove an actual injury, so even if they were correct on the issues raised in their application, this alternative issue concerning the absence of actual damages would either have to be addressed by this Court without the benefit of the lower court having decided it or remanded to the Texas state courts for consideration under Texas law.

7. Because of its disposition of the appeal, the Texas court of appeals did not address the factual insufficiency of the evidence of actual malice under Texas law. Accordingly, at most this Court could only remand the case to the state appellate court for consideration whether whatever new legal principles this Court might announce would change the appellate court's review of the evidence under settled Texas law. This Court probably has more urgent matters of national importance with which to concern itself.

ARGUMENT

I. Under Settled Legal Principles, the Court of Appeals Correctly Held that Einhorn and Wright Failed To Prove Actual Malice

A. Einhorn and Wright Were Limited-Purpose Public Figures

Einhorn and Wright argue that they were not limited-purpose public figures, so the standard of "actual malice" should not apply to them. Pet. at 11-15. If that were to be

their contention, they should have preserved it in the lower court. But by not objecting to the submission of "actual malice" in the charge to the jury, Einhorn and Wright waived any contention that standard did not apply in this case. 8 S.F. 92. *See, e.g., Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604 (Tex. 1964). Moreover, Einhorn and Wright elected not to raise that contention in their appeal following the trial on the merits. That abandoned contention is now waived.

Einhorn and Wright chose not to contest this issue at trial and on appeal presumably because the evidence was overwhelming. It is recounted at pages 12-13 of the Petition and pages 27-28 of the Appendix. Einhorn and Wright now say that much of that evidence concerns events occurring after they filed suit, so that it cannot be considered. Pet. at 14. The alleged defamation occurred in January 1986. Einhorn and Wright had already created a public controversy many months before then.

Based on the overwhelming evidence and their concessions, the court of appeals correctly concluded Einhorn and Wright were public figures.

B. As Limited-Purpose Public Figures, Einhorn and Wright Must Prove Actual Malice by Clear and Convincing Evidence

Texas and federal law is settled that public figures "must offer clear and convincing affirmative proof [of actual malice] to support a recovery." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Einhorn and Wright argue that this is not necessarily true for non-media defendants.

Pet. at 11-12. There are at least two flaws with their argument.

First, as discussed above, they waived the contention by not objecting to the jury charge. 8 S.F. 92. Second, it most certainly is required under controlling Texas constitutional law.

Under Texas law, the actual malice standard applies not only to defamation claims against media defendants, but also to claims against non-media defendants such as Hermann Hospital and William LaChance. As the Texas Supreme Court stated in *Casso*, "we are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens." *Casso*, 776 S.W.2d at 554. The supreme court further observed that, even under federal law, "[t]he First Amendment affords equal dignity to freedom of speech and freedom of the press . . . and the '[i]nherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source.' " *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)).

C. The Court of Appeals Correctly Exercised an Independent Examination of the Whole Record To Search for Clear and Convincing Evidence of Actual Malice

Einhorn and Wright steadfastly refuse to acknowledge this Court's constitutional command for appellate courts to "make an independent examination of the *whole* record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)

(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)) (emphasis added).

As this Court further stated in *Bose*, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501. "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.*

This characteristic of defamation law probably explains why more than 70 percent of the plaintiffs' verdicts in defamation cases tried to juries nationwide were reversed in whole or in part between 1984 and 1994. *Ten Years of "Independent Appellate Review" in Defamation Cases*, LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 2 at 1, 9, Apr. 30, 1994.

The independent appellate review mandated by the First Amendment to the United States Constitution is perfectly consistent with Texas law. In fact, it represents a *minimum* requirement under Texas law given that the affirmative grant of free speech in article I, section 8 of the Texas Constitution is more broadly worded than the First Amendment. *See generally Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992). As the Texas Supreme Court has

recognized repeatedly, free speech rights under the Texas Constitution are even broader than those guaranteed under the First Amendment. *Id.*; *see also Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *O'Quinn v. State Bar*, 763 S.W.2d 397, 402 (Tex. 1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988).

Accordingly, in recently reversing a defamation judgment, the Texas Supreme Court has itself examined the entire record, not just the evidence in favor of the prevailing plaintiff. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646-47 & n.7 (Tex. 1995). In following settled Texas law in the present case the court of appeals did not err.

D. The Court of Appeals Correctly Held that There Was No Clear and Convincing Evidence that LaChance Actually Entertained Serious Doubts About the Truth of his Statement

In defamation law, "[a]ctual malice . . . is a term of art which is separate and distinct from traditional common law malice." *Casso*, 776 S.W.2d at 558. Thus, "actual malice" exists only when a falsehood is published with knowledge of its falsity, or in reckless disregard of whether it was false. *E.g.*, *New York Times*, 376 U.S. at 280. To prove reckless disregard, Einhorn and Wright were required to prove by clear and convincing evidence that the disputed statement was made even though the speaker actually "entertained serious doubts as to the truth of [its] . . . publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Casso*, 776 S.W.2d at 558.

The stringent standard of review articulated in *Bose* must be employed to weigh proof of actual malice by "clear and convincing evidence." The jury charge – without objection – defined "clear and convincing evidence" as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction that the speaker had knowledge that the statements were false or acted with reckless disregard for whether the statement was false or not." Tr. 451. Thus, "[p]roof by clear and convincing evidence requires proof which is strong, positive, precise, unmistakable, and free from serious or substantial doubt. . . . " *Id.*

Because Einhorn and Wright have never challenged this definition, the court of appeals was *required* to employ it in reviewing the sufficiency of the evidence. 8 S.F. 92; *see Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985). Although the evidence proffered by Einhorn and Wright did not meet the usual Texas standards for factual and legal sufficiency, their evidence is all the more deficient under the definition of clear and convincing evidence applicable in this case.

1. Both subjective and objective facts prove LaChance believed what he said was true

LaChance testified that he believed his statement regarding the conflict of interest was true and entertained no doubts about the truth of his statement. 5 S.F. 86-87. He was still convinced as of the time of trial – more than seven years after making the statement to Strothert – that Einhorn and Wright had a conflict of interest. 5 S.F.

100-02. This subjective evidence of LaChance's state of mind stands uncontradicted in the trial court record.

Einhorn and Wright chant that the jury could disbelieve LaChance. Pet. at 16-20. But LaChance was not impeached; in fact, his credibility was unusual. For instance, he testified to things detrimental to his position: he admitted making the statement about conflict of interest to Strothert, even though Strothert himself could not remember it. *Compare* 5 S.F. 72 (LaChance) *with* 6 S.F. 171-72, 195-96, 204 (Strothert). Thus, this was not a case like *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612, 621 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985), in which the defendants' veracity was consistently impeached.

In any event, under Texas law "[i]t is not enough for the jury to disbelieve the defendant's testimony"; there must be "clear and convincing affirmative proof" of actual malice. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Einhorn and Wright lack that proof.

LaChance's testimony was corroborated by objective facts and by other witnesses. In the light of the following undisputed facts, it is easy to see why LaChance entertained no doubts about the truthfulness of his statement that Einhorn and Wright had a conflict of interest when they acted as intermediaries between Hermann's customer, UTMB, and Hermann's competitor, Bayport. 5 S.F. 86-87.

- In late 1985, Hermann was providing fixed-wing air ambulance service to UTMB and Shriner's Hospital in Galveston, 6 S.F. 180; 8 S.F. 41-42; Defendants' Exhibit 7.

- During this time frame the competition among area hospitals to provide air ambulance service was intense, 6 S.F. 35.
- Therefore, around the same time, UTMB was evaluating whether to use an airplane owned by Bayport Aviation to create a fixed-wing air ambulance service for UTMB and Shriner's, 6 S.F. 160-61, 183, 210.
- By this time, Wright had already hired a lawyer and was planning to quit his job at Hermann as soon as he could find a new job, 7 S.F. 88-89.
- Einhorn told Wright that Bayport was interested in "getting into patient transport services," 7 S.F. 80.
- Wright told Strothert at UTMB that Bayport was interested in showing its airplane to UTMB, so Strothert asked Wright to set up a meeting with Bayport, 7 S.F. 46-47, 81.
- Acting on Strothert's request, Wright called Einhorn, who in turn told Bayport about the meeting, 7 S.F. 81.
- Einhorn and Wright attended the December 26, 1985 meeting in Galveston with Strothert of UTMB and Mike Beaumont and Dr. Frank Darby of Bayport, during which Strothert and the other attendees examined Bayport's airplane to see whether it was suitable for air ambulance service, 4 S.F. 10-18; 7 S.F. 81.
- Einhorn and Wright attended the meeting to introduce UTMB and Bayport to one another, 4 S.F. 14; 7 S.F. 82-83.
- At the end of the meeting, Strothert told Wright he wanted a written proposal from

Bayport for the provision of air ambulance services to UTMB, 7 S.F. 82-83.

- Wright, in turn, relayed Strothert's request for a written proposal to Einhorn, 7 S.F. 82-83.
- On December 30, 1985 – a mere four days after the meeting with Strothert – Einhorn and Wright applied for and received an assumed name certificate under the name of "Associated Aviation Consultants," 4 S.F. 18-19; Plaintiffs' Exhibit 2.
- In January 1986, Wright picked up a copy of Bayport's proposal and hand-carried the proposal to Strothert in Galveston, 7 S.F. 83-84.
- The proposal had Wright's name on it, 7 S.F. 83-84.
- After delivering Bayport's proposal to provide air ambulance service to UTMB, Wright helped Strothert's assistant, Dr. Robert Mecker, to evaluate Bayport's proposal, 7 S.F. 84.
- Bayport and UTMB ultimately entered into an agreement under which Bayport provided fixed-wing air ambulance service to UTMB, 7 S.F. 86-87.
- Einhorn and Wright admit they acted as "intermediaries" between Bayport and UTMB, 7 S.F. 77-79; Defendants' Exhibit 42.

In addition to obtaining a copy of the assumed name certificate, as part of his investigation LaChance sought and obtained confirmation from one of the participants, Mike Beaumont of Bayport. 5 S.F. 67-69, 101, 130-31. Beaumont orally confirmed the role played by Einhorn

and Wright as intermediaries. 5 S.F. 69. LaChance then fired Einhorn and Wright, and he responded to Strothert's inquiry by stating they had a conflict of interest. 6 S.F. 23. Several weeks later with litigation apparent, LaChance asked Beaumont to confirm in writing his earlier oral statements to LaChance. 5 S.F. 107. Beaumont refused – not because he had not made the statements – but because he did not want to get involved in a dispute involving his friends, Einhorn and Wright. 5 S.F. 68-70, 111, 117.

LaChance, therefore, had ample reason to believe there was a conflict of interest; he did not act recklessly in stating to Dr. Strothert that Einhorn and Wright had a conflict of interest with Hermann Hospital. That LaChance's conclusion was not wholly fabricated is bolstered by the National Labor Relations Board, whose investigation concluded that Hermann Hospital discharged Wright and Einhorn based on legitimate business considerations arising out of their conflict of interest with Hermann. 10 S.F. 386.

Under Texas law, when defendants have "reasonable grounds to believe that their statements [are] true," they have "established an absence of malice . . . conclusively." *Randall's Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 647 (Tex. 1995). Because LaChance had reasonable grounds to believe there was a conflict of interest, the court of appeals correctly held there was no clear and convincing evidence of actual malice. This application of the procedural standard of review under Texas law should be binding on this Court, since the procedural rule is not being irrationally applied in order to defeat a federal right, but to promote a Texas and federal right.

2. Einhorn and Wright's circumstantial evidence failed to prove the ultimate fact – LaChance's subjective belief about his statement

Without objection, the charge instructed the jury that "clear and convincing" evidence requires proof that is "strong, positive, precise, unmistakable, and free from serious or substantial doubt." Tr. 451. As mentioned, Einhorn and Wright are now bound by that instruction. *See Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985) (court must review sufficiency of the evidence in the light of the jury charge as submitted). The charge, however, did *not* include an instruction about circumstantial evidence. (Einhorn and Wright did not even preserve the request for such an instruction.) It is therefore questionable whether they now can rely on purely circumstantial evidence to try to meet the test of clear and convincing evidence.

But, even if under Texas law circumstantial evidence could ever theoretically fit the charge's definition of clear and convincing evidence, and even if the jury could consider it without being instructed to do so, the meager circumstantial evidence offered by Einhorn and Wright did not establish actual malice by clear and convincing evidence. The circumstantial evidence they presented is an example of forbidden inference stacking: although they may have some evidence of ill will and falsity, neither of those facts sheds any light on the dispositive issue – whether LaChance actually entertained serious doubts about the truth of his statement.

The opinion of the court of appeals does not facially conflict with *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985). Instead, the court of appeals *cites Frank B. Hall, Inc.* for the proposition that actual malice *can* be proved by circumstantial evidence. App. at 5. Accordingly, there is no conflict, even under Texas law, about the applicable law; instead, the present decision turns solely on whether the particular facts of this case established actual malice. A holding that the particular facts do not amount to actual malice does not create a conflict sufficient to confer jurisdiction. This is all the more true when the case is decided primarily on the particular charge given the jury, rather than on the basis of new rules of law. That was precisely the situation in the present case.

Einhorn and Wright continually contend that ill will can be used to infer actual malice. Pet. at 20. This would be a rule of strict liability. Under their contention, Sam Donaldson could never again report on Ross Perot. Because there is evidence of past hostility, Donaldson could be held liable if he reported a falsehood – regardless of how much he believed in its truth or how much investigation had seemed to confirm it. That result is completely at odds with the freedom of expression regarding public figures envisioned by the United States and Texas Constitutions and mandated by the United States and Texas Supreme Courts.

Einhorn and Wright also argue that the appellate court's ruling will require a confession on the stand from the defendant. Pet. at 19. Not true. This Court itself has

delineated several other ways to prove actual malice, which including proving:

- the communication was fabricated by the defendant;
- it was the product of the defendant's imagination;
- it was based on an unverified anonymous phone call;
- it contains allegations that are so inherently improbable that only a reckless person would put them in circulation; or
- it was published despite obvious reasons to doubt the veracity of the information or source.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

Other ways to prove the defendant actually entertained serious doubts about the truth of the statement abound. For instance, the plaintiff can also present "smoking gun" memoranda or comments the speaker made to third persons that reveal the speaker's subjective doubts about the truth of the statement.

But instances of ill will tell one nothing about the speaker's belief as to the truth or falsity of the statement. The problem facing Einhorn and Wright is not the burden of proof. It is their lack of proof.

3. Suspicion plus suspicion equals more suspicion, but not some evidence

In an effort to meet their constitutionally required burden, Einhorn and Wright seize on four scant pieces of

what they call "circumstantial evidence." Under Texas law, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993) (footnote omitted). The unanimous court in *Reyna* rendered a take-nothing judgment in favor of the defendant in the face of allegations of tortious interference with contract. Because that cause of action is *not* restricted by the constitutional protections of free speech, its result should be all the more compelling in the present case involving allegations of defamation.

a. Falsity does not prove actual malice

At the outset, the Court should understand that the respondents do not admit falsity; they did not challenge the jury's finding in the court of appeals only out of respect for the applicable standard of review. Falsity can be shown by events occurring after the statement was made, for instance, the fact – unknown to LaChance at the time of his statement – that Einhorn and Wright were not immediately compensated for serving as intermediaries between UTMB and Bayport Aviation. This fact could support the jury's conclusion that there was no conflict of interest.

But, under Texas law, actual malice cannot be inferred from falsity. *E.g., Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 631 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.). Therefore, the dispositive point on appeal is not falsity, but actual malice – what did LaChance know before he made his statement? Thus, the charge – to which Einhorn and Wright did not object – required that

the statement be "made with a high degree of awareness of its probable falsity. There must be sufficient evidence to conclude that the Defendants in fact entertained serious doubts as to the truth of the publication." Tr. 452. On this point, they lack clear and convincing evidence.

b. Negligent investigation does not prove actual malice

LaChance initially heard rumors about the involvement of Einhorn and Wright with Bayport Aviation's pitch to UTMB through chief pilot Steve Kinnaman. 5 S.F. 62. LaChance did not stop there. Instead, he investigated and discovered the assumed name certificate Einhorn and Wright had applied for and received four days after meeting with Strothert. 4 S.F. 18-19; 5 S.F. 63-65; Plaintiffs' Exhibit 2. LaChance also called Mike Beaumont of Bayport Aviation on January 20, 1986; LaChance learned from Beaumont that Einhorn and Wright had told Beaumont about UTMB's interest in setting up a fixed-wing air ambulance program. 5 S.F. 67-69, 100-02, 130-31. This was occurring while competition among area hospitals to provide air ambulance service was intense. 6 S.F. 35; *see also* 10 S.F. 386.[1]

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[1] LaChance's investigation further distinguishes this case from cases on which Einhorn and Wright rely. *See Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 924 (Tex. App. – Corpus Christi 1991, writ dism'd); *Frank B. Hall, Inc. v. Buck*, 678 S.W.2d 612, 620 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 472 U.S. 1009 (1985); and *The Outlet Co. v. International Sec. Group, Inc.*, 693 S.W.2d 621, 628 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.).

Regardless, under Texas law, a failure to investigate or a negligent investigation is not actual malice. App. at 12 (citing cases). The jury charge – to which Einhorn and Wright did not object – "require[d] proof of more than- . . . negligence or failure to investigate the truth of a statement." Tr. 452. This instruction was consistent with Texas constitutional law:

> [Plaintiffs] were required to offer affirmative proof that [defendant] in fact knew his statements were false, or at least knew they were probably false. If we were to rule that what [defendant] "should have known" is sufficient proof, we would be applying a negligence standard which has been specifically rejected. . . .

Ross v. Labatt, 894 S.W.2d 393, 397 (Tex. App. – San Antonio 1994, writ dism'd).[2] Thus, even falsity *and* negligence are no evidence of actual malice. *Maewal v. Adventist Health Sys.*, 868 S.W.2d 886, 893 (Tex. App. – Fort Worth 1993, writ denied).

c. Ill will and personal spite do not prove actual malice

Unable to muster evidence of actual malice, Einhorn and Wright devote considerable effort to proving LaChance disliked Einhorn and Wright. For some reason only they can know, in their statement of facts Einhorn

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[2] *See also Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 941 (Tex. 1988); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 901 (Tex. 1970); *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969).

and Wright curiously juxtapose LaChance's statement to Strothert with a meeting that occurred one year later. Pet. at 7-8. LaChance's hostility toward Einhorn and Wright in January 1987 tells one nothing about his beliefs regarding the truth or falsity of his comment to Strothert one year earlier in January 1986. 7 S.F. 187-95. (In fairness, they were not overly fond of LaChance either: Wright and Einhorn once called a news conference at which they accused LaChance of felony theft, interstate transfer of stolen property, witness tampering, and mail fraud, among other crimes. 5 S.F. 98; 7 S.F. 114-15.) There was abundant evidence of ill will and spite infecting the relationship between LaChance, Einhorn, and Wright; however, it is not even a scintilla of evidence of the actual malice required to sustain the jury's verdict.

As the jury was instructed – without objection from Einhorn and Wright – actual malice "requires proof of more than personal spite." Tr. 452. This instruction was consistent with Texas constitutional law: actual malice "does *not* include ill will, spite or evil motive." *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex. 1994) (per curiam); *Casso*, 776 S.W.2d at 558 (emphasis added); *accord Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-67 (1989); *New York Times*, 376 U.S. at 280.

Moreover, as a matter of controlling constitutional law:

> Proof of falsity in fact is not enough, nor is proof of a combination of falsehood and general hostility. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10, 90 S. Ct. 1537, 1539, 26 L. Ed. 2d 6 (1970) ("the jury was permitted to find

> liability merely on the basis of falsehood and generally hostility. This was error of constitutional magnitude, as our decisions have made clear.").

Seidenstein v. National Medical Enter., Inc., 769 F.2d 1100, 1104 (5th Cir. 1985).

Nevertheless, Einhorn and Wright contend that actual malice equals ill will plus something, anything. Thus, they argue that even though animosity alone is not sufficient to establish actual malice, the cumulative weight of ill will among the litigants *plus* other factors such as falsity and failure to investigate can combine to meet the actual malice standard.

Their contention, however, cannot be reconciled with the Texas Supreme Court's most recent pronouncements on actual malice. The Supreme Court of Texas once again highlighted the distinction between actual malice and mere ill will or animosity in *Hagler v. Proctor & Gamble Manufacturing Co.*, 884 S.W.2d 771 (Tex. 1994) (per curiam). As the court reaffirmed in *Hagler*, "Actual malice in the defamation context *does not include* ill will, spite, or evil motive. . . . " *Id.* (emphasis added). Rather, actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 771-72 (quoting *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989)).

In *Hagler*, the Fourth Court of Appeals had reversed and remanded on factual insufficiency grounds a jury finding that Proctor & Gamble made a defamatory statement about its employee, Hagler, with actual malice. *Proctor & Gamble Mfg. Co. v. Hagler*, 880 S.W.2d 123, 128-29

(Tex. App. – San Antonio), *writ denied per curiam*, 884 S.W.2d 771 (Tex. 1994). The court of appeals relied on the Thirteenth Court of Appeals' decision in *Shearson* for the proposition that actual malice requires a "higher level of culpability" than mere ill will or animosity, suggesting that ill will was a necessary ingredient of actual malice, but was not sufficient by itself to establish actual malice. *Proctor & Gamble Mfg.*, 880 S.W.2d at 126, 128.

In its per curiam denial of Hagler's application for writ of error, the court completely rejected this "culpability" approach to actual malice. The court disapproved of the appellate court's analysis and specifically *rejected* the following language from the appellate court's decision: "[A]ctual malice generally requires a higher level of culpability than mere ill will or animosity. Here, the evidence does not rise to the level of ill will, much less to a higher level of culpability." *Hagler*, 884 S.W.2d at 771 (quoting 880 S.W.2d at 128-29).

Having rejected this conception of actual malice, the Texas Supreme Court repeated its admonishment from *Casso* that, under Texas law, actual malice "does not include ill will, spite or evil motive." *Hagler*, 884 S.W.2d at 771. To make the point perfectly clear, the court stated again that "actual malice is not ill will." *Id.* This is the very distinction between "[a]ctual malice [which], as used in defamation cases, is a term of art which is *separate and distinct* from traditional common law malice." *Casso*, 776 S.W.2d at 558 (emphasis added).

In *Casso* and *Hagler*, the Supreme Court of Texas did not say merely that ill will "standing alone" is insufficient to show malice. Instead, the court framed its exclusion in

the broadest possible terms by holding that actual malice "does not include" and "is separate and distinct from" ill will. Therefore, Einhorn and Wright cannot bootstrap their way to an actual malice finding by first pointing to evidence of ill will and then contending that ill will combined with other evidence establishes actual malice. Because actual malice "does not include" and "is separate and distinct from" ill will, evidence of ill will can be neither the sole indicator of actual malice nor even a component of actual malice. Otherwise, actual malice would include ill will. As *Hagler* and *Casso* make clear, the existence of ill will proves nothing more than the existence of ill will.

Stated another way, *Hagler* and *Casso* teach that actual malice does not sit at the far end of a spectrum that begins with mere animosity. One cannot travel along an imaginary path on which animosity gradually blends into actual malice by showing there was "a lot" of ill will among the litigants, or showing evidence of animosity "plus something else." As this Court has stressed, actual malice exists on an entirely different plane than does mere ill will or animosity. Making the leap from mere ill will to the higher plane of actual malice requires a very specific type of evidence: knowledge of, or serious doubts about, falsity. Einhorn and Wright have no such proof.

II. Insufficient Evidence Proves the Challenged Statement Caused an Actual Injury to Einhorn and Wright

In the court of appeals, Einhorn and Wright understandably wanted to avoid a detailed analysis of their

non-existent damages evidence. They excused their avoidance by contending damages must be presumed because the statement at issue was slanderous *per se* as a matter of law. Br. of Appellees at 19-22. But their contention ignores the constitutional dimensions of public figure defamation suits, which require proof of an actual injury. *E.g., Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 45 (W.D. Tex. 1984).

For a public figure to recover damages, the record also must contain evidence of an actual injury. "Balancing the important first amendment interests present when the alleged defamation concerns a public figure such as this plaintiff against providing compensation for injuries to reputation, the Supreme Court has directed that proof of actual injury . . . precede recovery." *Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 45 (W.D. Tex. 1984); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 348-50 (1974). Actual injury means impairment of reputation and standing in the community, personal humiliation, mental anguish, or economic loss. *Id.*

In any event, the law of the case doctrine bars this contention. The appellate court's first opinion concluded that the challenged conflict of interest statement did *not* constitute slander *per se*. *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App. – Houston [1st Dist.] 1992, writ dism'd). Determining whether a statement is capable of defamatory meaning presents a threshold question of law for the court to decide. *Id.* In accordance with the appellate court's prior opinion, the jury was asked in question no. 1 whether the challenged "conflict of interest" statement was defamatory. Tr. 447; *see id.* "Only if the court determines the language is ambiguous or of doubtful

import should the jury determine the statement's meaning and the effect of the statement's publication on the ordinary reader." *Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 446-47 (Tex. App. – Houston [1st Dist.] 1993, no writ).

Given that the conflict of interest statement at issue here was ambiguous or of doubtful import, Einhorn and Wright cannot prove it is "so obviously hurtful" that, as a matter of law, the statement constitutes slander *per se*. Thus, their presumed damages argument collapses. They cannot explain exactly how evidence relating to a defunct wrongful termination claim can constitute legally or factually sufficient evidence of actual injury from defamation.

The record demonstrates that Einhorn and Wright proffered legally and factually insufficient evidence to establish that the challenged "conflict of interest" statement proximately caused any harm – much less $250,000 worth of harm to each of them. Recall that following the first appeal, the only allegedly defamatory statement in issue was the following:

> [I]n response to a question by Dr. Strothert at UTMB in a telephone call on January 22, 1986, [LaChance said] that Plaintiffs Don Wright and Tom Einhorn had a "conflict of interest" with Hermann Hospital.

Tr. 446.

The recipient of LaChance's comment, Dr. Strothert at UTMB, testified unequivocally that he did not think any less of Einhorn or Wright as a result of what LaChance said to him. 6 S.F. 195-96. In fact, at trial,

Strothert had no recollection whatsoever of the statement having been made. 6 S.F. 171-72, 195-96, 204. Strothert's reaction explains why no subsequent prospective employers told Wright they would not hire him because of the "conflict of interest" statement. 7 S.F. 116-18. Wright himself acknowledged the more plausible explanation that his difficulty in obtaining a job after Hermann Hospital fired him stemmed from

(1) his heavy and highly public involvement in NEMSPA, which was not popular among industry employers; and

(2) the 1983 crash of a helicopter Wright was piloting, for which the NTSB found Wright at fault and temporarily suspended his license.

7 S.F. 116-20, 121-26; Defendants' Exhibits 34, 35, 36, 37.

Although Einhorn and Wright both offered conclusory testimony that they felt the statement harmed their reputations, 4 S.F. 62-65, 7 S.F. 73, neither was able to tie the conflict of interest statement to any specific monetary losses. Einhorn and Wright produced no witness who testified that a prospective employer refused to hire them because of the "conflict of interest" statement. Einhorn acknowledged that he never sought treatment from a physician for his alleged mental anguish and suffering. 4 S.F. 62-63.

Both testified that they lost approximately $100,000 in income during the three years after they were fired. 3 S.F. 153; 7 S.F. 69-71. These sums, however flow from Hermann Hospital's decision to fire Einhorn and Wright; they have nothing to do with the separate issue of

whether the "conflict of interest" statement by William LaChance to Dr. Strothert on January 22, 1986 caused harm to them. Absent evidence connecting the asserted harm to the asserted falsehood, Einhorn and Wright cannot recover. *See A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.) (defamation plaintiff's testimony that he was embarrassed and humiliated, that he could name no one who thought less of him because of disputed article, and that he had suffered no financial injury amounted to no evidence of damages and could not support $1 million actual damage award).

Undaunted by the NLRB's rejection of their wrongful termination claims, Einhorn and Wright used their single remaining slander claim as a pretext for retrying their already dead wrongful termination suit. To that end, they introduced copious evidence relating to alleged safety problems in the Hermann Hospital Life Flight program and Hermann Hospital's response to their complaints. This evidence, however, cannot support Einhorn's and Wright's surviving slander claim because the NLRB has primary and exclusive jurisdiction to hear and determine claims that an employee was discharged for engaging in concerted activity protected by the National Labor Relations Act. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *cf. Burgess v. El Paso Cancer Treatment Ctr.*, 881 S.W.2d 552, 555-56 (Tex. App. – El Paso 1994, writ denied) (Texas common law recognizes no private "whistleblower" cause of action). It is no evidence of slander, LaChance's state of mind, or damages proximately caused by the challenged statement.

Having abandoned any effort to prove the single slander claim that was remanded for trial, opting instead to resurrect their wrongful discharge case, Einhorn and Wright now must try to uphold their slander judgment on a record bereft of evidence of actual malice or actual damages proximately caused by the "conflict of interest" statement. Their effort must fail in light of the record before this Court and controlling Texas law.

CONCLUSION

Respondents, William LaChance and Hermann Hospital, ask this Court to deny the petition for writ of certiorari, or to affirm the take-nothing judgment, or, alternatively, to remand this cause to the court of appeals or for a new trial. The respondents further request all other relief to which they may be entitled.

Respectfully submitted,

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